Supreme Court, U.S.
FILED

No. 09-904 JAN 25 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SOUTH WEST SAND & GRAVEL, INC.,

Petitioner,

v.

CENTRAL ARIZONA
WATER CONSERVATION DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Arizona

PETITION FOR WRIT OF CERTIORARI

ROBERT G. SCHAFFER
Counsel of Record
ROBERT F. ROOS
LAWRENCE A. KASTEN
LEWIS AND ROCA, LLP
40 N. Central Avenue
Phoenix, Arizona 85004
(602) 262-5311

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

In 1999, Respondent Central Arizona Water Conservation District obtained permits to store Arizona's surplus supplies of Central Arizona Project water in an aquifer underlying Petitioner's property. By dramatically raising the water table for the first time since the 1920s, the project caused subsurface water to flood Petitioner's mining operations. The Arizona Court of Appeals denied compensation on the ground that a state statute, enacted in 1986, authorizes the uncompensated permanent physical occupation of Petitioner's property for the purpose of underground water storage, even to the point of destroying all use of the property for mining.

The questions presented are:

1. Whether a state statute imposing a newly-decreed "underground water storage easement," which goes beyond any pre-existing limitations on the landowner's title, effects a *per se* taking under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether a state court's novel and unreasonable interpretation of a pre-existing title limitation, which has the effect of defeating an otherwise valid *per se* takings claim, violates the Due Process and Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

RULE 14.1 AND 29.6 STATEMENT

South West Sand & Gravel, Inc., the sole Petitioner, has no parent corporation and no publicly held company owns ten percent or more of its stock.

Respondent is the Central Arizona Water Conservation District.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
RULE 14.1 AND 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. South West's Property	3
B. Arizona's Groundwater Recharge Laws	4
C. The Agua Fria Recharge Project	7
D. The Flooding of South West's Property	9
E. The Proceedings Below	10
REASONS FOR GRANTING THE PETITION	13
I. The Decision Below Contravenes *Lucas*	14
II. The Decision Below Conflicts With Other Decisions Of This Court	21
III. The Decision Below Raises Important Constitutional Issues That Should Be Resolved By This Court	23
CONCLUSION	25

TABLE OF CONTENTS – Continued

Page

APPENDICES:

Arizona Court of Appeals Opinion: *South West Sand & Gravel, Inc. v. Central Arizona Water Conservation District*, 221 Ariz. 309, 212 P.3d 1 (Ct. App. 2008) ..... App. 1

Maricopa County Superior Court Order Denying Plaintiff's (SWSG) Motion for Partial Summary Judgment (November 9, 2006) ..... App. 26

Maricopa County Superior Court Order Granting Defendant's (CAWCD) Motion for Summary Judgment (February 28, 2007) ..... App. 33

Arizona Court of Appeals Order Denying Appellant's (SWSG) Motion for Reconsideration (March 13, 2009) ..... App. 35

Arizona Supreme Court Order Denying Appellant's (SWSG) Petition for Review (October 28, 2009) ..... App. 37

Revised Statues of Arizona Territories §§ 4202-03 (1901) ..... App. 39

Arizona Revised Statutes Civil Code §§ 5342-53 (1913) ..... App. 41

Arizona Revised Statues § 3323 (1928) ..... App. 43

Arizona Code 1939, § 75-144 ..... App. 44

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Armstrong v. United States, 364 U.S. 40 (1960).....22

Hughes v. Washington, 389 U.S. 290 (1967).....20

Kaiser Aetna v. United States, 444 U.S. 164 (1979).....22

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)..... 11, 13, 14, 20, 21, 23, 24, 25

Stevens v. City of Cannon Beach, 510 U.S. 1207, 114 S. Ct. 1332 (1994).....20

United States v. Causby, 328 U.S. 256 (1946).....13, 21, 22, 23

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).....21

United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).....21

STATE CASES

Amador Valley Invs. v. City of Livermore, 117 Cal. Rptr. 749 (Ct. App. 1974) 17

County Bd. of Comm'rs v. Park County Sportsmens Ranch, LLP, 45 P.3d 693 (Colo. 2002) 18

Dunbar v. Humbolt Bay Mun. Water Dist., 62 Cal. Rptr. 358 (Ct. App. 1967).....17

Fell v. M. & T., Inc., 73 Cal. App. 2d 692, 166 P.2d 642 (1946).....17

TABLE OF AUTHORITIES – Continued

Page

Vantex Land & Dev. Co. v. Schnepf, 82 Ariz. 54, 308 P.2d 254 (1957) 17, 18

West Maricopa Combine, Inc. v. Arizona Dep't of Water Resources, 200 Ariz. 400, 26 P.3d 1171 (Ct. App. 2001) 11, 12, 17, 19, 20

DOCKETED CASES

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, No. 08-1151 (argued Dec. 2, 2009) 24

RULES, REGULATIONS AND STATUTES

Arizona Revised Statutes:

§ 45-173 ..... 2, 3, 11, 19
§ 45-173(A) 11, 15, 18
§ 45-801.01 4
§ 45-801.01(4) 5
§ 45-801.01(12) 5
§ 45-811-01(C)(3) 4, 9, 11, 19
§ 45-814-01(F) 4
§ 45-814-01(G) 4, 19
§ 45-814-01(H) 5
§ 45-831.01 5

TABLE OF AUTHORITIES – Continued

Page

§ 45-832.01 5

§ 45-834.01 5

§ 45-852.01 5

§ 45-891.01 6

§ 45-2401 6

Revised Statutes of Arizona Territories (1901):

§ 4202.....3, 12

§ 4203.....3, 12

United States Code:

28 U.S.C. § 1257(a) 1

United States Constitution:

Fifth Amendment.....2, 13, 21

Fourteenth Amendment 2, 21

OTHER AUTHORITIES

1986 Ariz. Sess. Laws, Ch. 289 § 4 .....4, 11

AWBA, Interstate Water Banking Report, Fiscal Year 2009, available at http://www.azwaterbank.gov/awba/documents/FinalInterstateAccountingReportFY09.pdf (last viewed 1/25/10).....7

AWBA Bank Deliveries, available at http://www.awba.state.az.us/ledger/ (last viewed 1/25/10).....7

TABLE OF AUTHORITIES – Continued

Page

Wells A. Hutchins, *Selected Problems in the Law of Water Rights in the West*, United States Dept. of Agriculture, Miscellaneous Pub. No. 418 (1942) 16

2 Clesson S. Kinney, LAW OF IRRIGATION AND WATER RIGHTS (2d ed. 1912) 17

Shaun McKinnon, *State's Draw of River Water Declines; Arizona Set To Store Its Extra Allocation Plus Some of Nevada's*, THE ARIZONA REPUBLIC, June 24, 2005 7

A. Dan Tarlock, LAW OF WATER RIGHTS AND RESOURCES § 6.30 (2008) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at 221 Ariz. 309, 212 P.3d 1 (Ct. App. 2008) and is reproduced at Pet. App. 1. The order of the Supreme Court of Arizona denying discretionary review is unreported and is reproduced at Pet. App. 37. The orders of the superior court are unreported and are reproduced at Pet. App. 26.

JURISDICTION

The Arizona Court of Appeals' opinion was filed on November 11, 2008. Petitioner filed a timely Motion for Reconsideration which was denied on March 13, 2009 (Pet. App. 35), and a subsequent timely Petition for Review to the Arizona Supreme Court on April 10, 2009, which was denied on October 27, 2009 (Pet. App. 37). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

Arizona Revised Statutes Section 45-173 provides in relevant part:

> *Use of natural waterway to carry water of another or for other water projects; dispute over division of waters*
>
> A. Although the waters which naturally flow in the natural channel of a stream have been previously appropriated and put to beneficial use by others, the channel may be used to carry water of another or used for the location of an underground storage facility pursuant to chapter 3.1 of this title, if such use can be made without diminishing the quantity of water which naturally flows therein the use of which has been appropriated.

REV. STAT. OF ARIZ. TERR. §§ 4202-03 (1901) and other predecessor statutes to A.R.S. § 45-173 are reproduced at Pet. App. 39.

The pertinent parts of Arizona Revised Statutes Sections 45-811.01 and 45-814.01 are reproduced at Pet. App. 45.

STATEMENT OF THE CASE

A. South West's Property

Petitioner South West Sand & Gravel, Inc. ("South West") owns two small properties near the Agua Fria River in Maricopa County, Arizona. South West purchased the properties in 1997 and commenced sand and gravel extraction operations that year. One of South West's properties is a fifteen-acre parcel located outside of the floodplain on a 30-foot-high terrace above the Agua Fria River channel, about 1,000 feet west of the channel. The other property is a seventeen-acre parcel located in the channel. A flood-plain use permit allows mining of the parcel in the channel to a depth of ten feet.

Since construction of an upstream dam in the 1920s, the Agua Fria River channel near South West's properties has been essentially dry, except for water caused by occasional precipitation. As a result, at the time South West bought its properties and commenced mining, it did so with the reasonable expectation that it would be able to mine its property to a reasonable

depth, well above the underlying groundwater, and it backed that expectation with a substantial financial investment.

B. Arizona's Groundwater Recharge Laws

In 1986, the Arizona legislature established the Underground Water Storage and Recovery Program to allow persons with surplus supplies of water to store that water underground and recover it at a later time for the storer's use. 1986 Ariz. Sess. Laws, Ch. 289 § 4, *codified as amended at* A.R.S. § 45-801.01 *et seq*.

The Arizona Department of Water Resources ("the Department") is authorized to issue permits for underground water storage after determining, among other things, that "[s]torage at the facility will not cause ***unreasonable harm*** to land or other water users" within the facility's area of impact. A.R.S. § 45-811.01(C)(3) (emphasis added). To this end, the Department may require monitoring of the facility's operations "and the impact of water storage at the facility on land and other water users within the area of impact of water stored at the facility." *Id.* § 45-814.01(F). The Department is also authorized to require modification of a facility's operations if necessary, but in doing so the Department may only consider land uses that were "in existence when the permit was issued." *Id.* § 45-814.01(G). Consistent with these statutory directives, Arizona's recharge statutes provide that "[n]othing in this article [A.R.S.

§ 45-801.01-§ 815.01] shall be construed as modifying or infringing on any existing water rights or private property rights." *Id.* § 814.01(H).

A permit may be issued for two different types of water storage: a "managed underground storage facility" or a "constructed underground storage facility." A "managed underground storage facility" involves the release of water into a natural channel, where the water is allowed to infiltrate the surface of the streambed and percolate into the soil. *Id.* § 45-801.01(12). A "constructed underground storage facility" involves the use of man-made structures such as "injection wells" or "spreading basins" constructed in or adjacent to a streambed that confine the water and force it to seep into the ground. *Id.* § 45-801.01(4).

Owners of long-term rights to water (such as cities and towns, irrigation districts, private water companies, and industrial or agricultural users) may enter into "water storage contracts" with an underground storage facility to store surplus supplies of water underground. *Id.* § 45-831.01. "Long term storage credits" are issued for the stored water and can be redeemed at a later time or transferred to others. Holders of statutory storage credits may save the credits for the future when water supplies run short or make immediate withdrawals at other locations. *Id.* §§ 45-832.01, -834.01, -852.01. Holders of statutory credits are thus not required to pump and use water from the same area in the future, but may recover different groundwater, of higher quality,

even from different aquifers, at more valuable locations, anywhere within the same groundwater management area, and may do so without violating the state's stringent restrictions on groundwater withdrawals. The different water thus pumped can be used or sold for the owner's profit.

In 1990, in recognition that Arizona was not using its full allocation of 2.8 million acre feet of Colorado River water and was thus forfeiting its unused allocation to other lower basin states, the Arizona legislature provided funds for the Central Arizona Water Conservation District ("CAWCD") to construct underground storage facilities – called "State Demonstration Projects" – for the storage and eventual recovery of surplus Central Arizona Project ("CAP") water. A.R.S. § 45-891.01 et seq. In 1996, the Arizona legislature established the Arizona Water Banking Authority ("AWBA") to further facilitate the underground storage of Arizona's surplus CAP water. A.R.S. § 45-2401 et seq. Using tax revenues and other funding sources, the AWBA acquires excess CAP water under contracts with CAWCD, and stores that water at underground storage facilities throughout the state. The credits thus earned are held in reserve and may be used for, among other things, ensuring an adequate water supply to municipal and industrial users in times of shortage or disruptions of the CAP system, assisting in the settlement of Indian water rights claims, and exchanging water for the benefit of communities on the Colorado River.

The public and private benefits provided by Arizona's ability to store its surplus Colorado River water in reserve for the future extend even beyond the state's borders. In 2005, the AWBA entered into an interstate water banking agreement to store 1.25 million acre feet of water on behalf of Nevada. *See* Shaun McKinnon, *State's Draw of River Water Declines; Arizona Set To Store Its Extra Allocation Plus Some of Nevada's*, THE ARIZONA REPUBLIC, June 24, 2005. Under the agreement, Nevada will pay Arizona $330 million – $23 million a year for 10 years plus $100 million above the actual cost of water delivery and storage – to store water in Arizona, which Nevada may then withdraw in times of need directly from Lake Meade. To date, the Authority has stored some 527,520 acre feet on behalf of Nevada and 77,253 acre feet at CAWCD's Agua Fria recharge facility alone. *See* AWBA, Interstate Water Banking Report, Fiscal Year 2009, available at http://www.azwaterbank.gov/awba/documents/FinalInterstateAccountingReportFY09.pdf (last viewed 1/25/10); AWBA Bank Deliveries, available at http://www.awba.state.az.us/ledger/ (last viewed 1/25/10).

C. The Agua Fria Recharge Project

CAWCD manages the Central Arizona Project, which delivers water from the Colorado River to Arizona's largest cities. In 1999, CAWCD obtained permits to begin a "State Demonstration Project" in the Agua Fria River channel, to the south of Waddell

Dam near South West's properties. The project is known as the "Agua Fria Recharge Project."

The Department issued the permits on May 4, 1999, allowing CAWCD to "recharge" the area by two different methods. First, CAWCD uses a man-made diversion structure to the north of South West's property to divert CAP water into the dry riverbed. The water then flows down an unlined 4-mile stretch of the river, where water infiltrates the riverbed and the underlying soil. Second, at the end of the 4-mile stretch is a man-made headworks (essentially, an earthen dam) that diverts the water out of the active channel and into a concrete-lined canal, which conveys the water to 100 acres of "spreading basins." The spreading basins confine the water and force it to seep into the surrounding alluvium. The portion of the project within the unlined channel of the river is referred to as the "managed" facility, and the earthen dam, concrete-lined canal and unlined basins that confine the water and prevent it from flowing downstream are referred to as the "constructed" facility.

South West's fifteen-acre parcel is situated about 1,200 feet west of the southern end of the managed section. The seventeen-acre parcel is about 700 feet south of the constructed facility.[1] Infiltration began at the managed facility on October 22, 2001, and at the

---

[1] A site map from the record showing the location of South West's properties and the government's recharge project is reproduced at Pet. App. 47.

constructed facility on April 22, 2002. CAWCD's permits allow it to divert 100,000 acre feet of water into the riverbed each year for twenty years.[2]

D. The Flooding of South West's Property

As discussed above, in order to obtain a permit to operate its recharge project, Arizona law required CAWCD to demonstrate that no "unreasonable harm" would befall nearby "land users." A.R.S. § 45-811.01(C)(3). In designing the project, CAWCD fully understood and anticipated that the water table beneath South West's properties would rise over the course of the project. In fact, in its permit applications and related documents, CAWCD specifically acknowledged South West's nearby mining operations and stated that "perched recharge water or excessive groundwater level may cause seepage into the pits." Although it recognized this potential for harm, CAWCD minimized it in its permit applications, suggesting that the risk of harm was slight because, at the time of the application, South West was mining "to depths less than 50 feet on a terrace that is approximately 30 feet above the river bed." Nonetheless, CAWCD assured the Department that "[c]lose operational monitoring . . . will be undertaken to insure that unreasonable harm does not occur to these gravel operations." CAWCD also pledged to

---

[2] An "acre foot" is a standard measure for large quantities of water. It represents the amount of water it would take to fill one acre of land to a depth of one foot. 100,000 AF is approximately 32.6 billion gallons.

"maintain contact with the two gravel mining operators to assess the total depth of the mining operations" and, if necessary, "implement facility operation changes."

Despite these assurances, groundwater "mounding" from CAWCD's recharge operations has created, and continues to create, artificially high water levels, causing subsurface water to infiltrate South West's nearby sand and gravel pits. As a result, South West's pits have been continuously or intermittently flooded since approximately October 2003. Because further extraction efforts would be prohibitively costly, South West was forced to abandon all mining operations and the mining value of its property has been destroyed.

E. The Proceedings Below

In January 2005, South West filed its complaint, asserting claims for, among other things, inverse condemnation and nuisance based on the harmful permanent physical occupation of its property. The parties filed cross-motions for summary judgment. The superior court granted CAWCD's motion and denied South West's motion, entering judgment against South West on all of its claims. Pet. App. 26.

The court of appeals affirmed. Although the court did not dispute that CAWCD's recharge operations have destroyed the mining value of South West's property, it nonetheless denied compensation on the ground that South West never had the property

rights that assertedly have been taken. To reach this result, the court relied on its earlier decision in *West Maricopa Combine, Inc. v. Arizona Department of Water Resources*, 200 Ariz. 400, 26 P.3d 1171 (Ct. App. 2001), which held that an Arizona statute, A.R.S. § 45-173, authorized the use of "natural channels" of a stream "for the location of an underground storage facility,"[3] and thus the owner of such a facility may use a natural channel for a "managed" storage facility without the consent of property owners. Relying on this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *West Maricopa Combine* further held that two statutes enacted in 1901 when Arizona was a territory – authorizing the owner of "reservoirs" to make use of "natural channels of streams" to "conduct" appropriable waters to their place of use – effected "the state's reservation of the natural channels to move **and store** water."

---

[3] Section 45-173(A) provides in pertinent part:

> Although the waters which naturally flow in the natural channel of a stream have been previously appropriated and put to beneficial use by others, the channel may be used to carry water of another *or used for the location of an underground storage facility pursuant to chapter 3.1 of this title* . . .

In 1986 and later years, the statute was amended to include the italicized language. 1986 Ariz. Sess. Laws, Ch. 289 § 4. "Chapter 3.1," which is referenced in the amended statute, sets forth, among other things, the requirement that a permit can only be issued if it is shown that the project will not cause "unreasonable harm" to "land users." A.R.S. § 45-811.01(C)(3).

Pet. App. 9 (citing REV. STAT. OF ARIZ. TERR. §§ 4202-03 (1901), reproduced at Pet. App. 39) (emphasis added). By construing these territorial statutes as having "reserved" a right to "move **and store**" water, the court was thus able to bring underground water storage within the reach of these statutes, precluding a landowner from asserting a takings claim based on the physical intrusion of water onto its property. In so doing, the court rejected the Department's contrary view that the consent of property owners is required to operate a "managed" water storage facility by flooding privately owned land in a dry river channel.

In this case, the Arizona Court of Appeals broadened this "reservation" even further, concluding that Arizona's territorial statutes should be interpreted to authorize not merely the *noninjurious* use of natural channels to transport water (as in *West Maricopa Combine*), but uncompensated interference with existing land uses (as here).[4] Applying its newly

---

[4] As South West explained below, *West Maricopa Combine* does not provide authority for depriving South West of its right to compensation for the type of tangible economic injury it suffered here because that case only addressed whether water could be moved, in the natural channel of a river, through private land that was not being used and where no interference with the use of the property was alleged. Certainly, there is nothing whatsoever in the case suggesting that, if in the course of using a natural channel, a party damages or interferes with the present use of the property, it may avoid tort remedies or, in

(Continued on following page)

expanded "reservation" in this case, the court thus concluded that because CAWCD was simply using a channel "for the intended statutory purpose" (to **store** water), and because CAWCD was immune from liability for interfering with other property uses (under the Court's expansion of the reservation here), "[n]o taking can arise from such activity." Pet. App. 10.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* for three reasons. *First*, the Arizona Court of Appeals' decision cannot be reconciled with this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which confirms that the government cannot impose new title limitations on private property that do not merely replicate those already present under the state's background law. Far from constituting a pre-existing title limitation, the Arizona Court of Appeals' creation of a novel "water storage easement" goes far beyond anything Arizona's background statutory or common law permitted. *Second*, the Arizona Court of Appeals' decision conflicts with other cases from this Court, most notably *United States v. Causby*, 328 U.S. 256 (1946), recognizing that the government cannot simply open

---

the case of government action, resist compensation under the Just Compensation Clause of the United States Constitution.

private property for public use, no matter how important the public interests involved, where no such historical analogue exists in the state's background law of property. *Third*, the question presented addresses an important issue of federal law and presents this Court with the opportunity to provide much-needed guidance about the takings implications of a state court's retroactive elimination of property rights based on a novel (and unreasonable) interpretation of the state's background law.

I. The Decision Below Contravenes *Lucas*.

Although *Lucas* was a regulatory takings case, the Court drew from its physical takings cases to explain how the "background principles" inquiry should be applied in the context of a permanent physical occupation:

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426 – though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.

505 U.S. at 1028-29.

In this case, the Arizona Court of Appeals denied compensation on the ground that the 1986 amendment to section 45-173(A), which the court construed as authorizing the permanent physical invasion of South West's property, even to the point of destroying all use of the property for mining, did no more than replicate a title limitation already inherent in Arizona law. However, the court's holding was plainly incorrect in two separate respects, both of which present an important issue of constitutional significance. In essence, the court employed two entirely implausible and unreasonable interpretations of Arizona background law, which, when combined in this case and treated as a "title limitation," operated to deprive South West of its legitimate and constitutionally protected right to compensation for the harmful physical occupation of its property.

First, and perhaps not surprisingly given the complete lack of any authority for its position, the court relied on nothing but its own *ipse dixit* to conclude that section 45-173(A) and its territorial predecessors should be interpreted as affording not only the right to use natural channels to transport water but also the far greater right to damage and interfere with other uses of property in or along a river channel. Not only did the court offer no support for this unprecedented interpretation, but it disregarded the overwhelming contrary authority South West cited that confirmed that statutes of this type are extremely commonplace in western states and that these statutes simply codified a *limited*

departure from the traditional common-law right of landowners to exclude others from physically invading their property in a streambed, not a right to interfere with other present uses of the property. As a leading authority on western water law writes:

> All of the Western States . . . have statutory provisions authorizing the use of natural streams for the conveyance of water by persons entitled to its use, under certain limitations. . . .
>
> The right to use a natural stream for the conveyance of water reduced to control has been sustained elsewhere even before the enactment of statutes, and there would seem to be no reason for denying the right *in cases in which existing uses of the stream are not adversely affected.*

Wells A. Hutchins, *Selected Problems in the Law of Water Rights in the West*, United States Dept. of Agriculture, Miscellaneous Publication No. 418 at 358-59 (1942) (emphasis added). This limitation has been emphasized by both earlier, contemporaneous treatise writers and modern-day authorities:

> The authorities have held from the earliest history of the doctrine of prior appropriation that, after the water has been once diverted from its natural channel, it may be turned back into the stream from which it was originally taken and be recaptured, *provided that the rights of others are not injuriously affected thereby.*

2 Clesson S. Kinney, LAW OF IRRIGATION AND WATER RIGHTS, at 1459 (2d ed. 1912) (emphasis added); A. Dan Tarlock, LAW OF WATER RIGHTS AND RESOURCES § 6.30 (2008) ("If riparian landowners along the river can require consent to use the riverbed, storage would be prohibitively costly and riparians would receive a windfall *absent a showing of damage beyond a technical trespass.*") (emphasis added) (citing *West Maricopa Combine*, 200 Ariz. 400, 26 P.3d 1171 (Ct. App. 2001)).

Other cases, including relevant authority from the Arizona Supreme Court, are in accord. *See Vantex Land & Dev. Co. v. Schnepf*, 82 Ariz. 54, 56-57, 308 P.2d 254, 255-56 (1957) ("The defendants are not obliged to leave this drainage wash in its natural state in order to furnish the upper owners a drain ditch to carry their surplus waters. The law imposes no such servitude upon the lower landowner."); *see also Amador Valley Invs. v. City of Livermore*, 117 Cal. Rptr. 749, 754 (Ct. App. 1974) (the law does "not permit the use of natural water courses for the carrying of artificially originated waters, except within the limits that such use of the natural waterways be confined to reasonable, noninjurious use."); *Dunbar v. Humbolt Bay Mun. Water Dist.*, 62 Cal. Rptr. 358, 361 (Ct. App. 1967) ("The right to use a natural channel as a conduit for artificial flow . . . is well established so long as such use does not interfere with the rights of others. If such use does interfere, then the damage caused is compensable."); *Fell v. M. & T., Inc.*, 73 Cal.

App. 2d 692, 694-95, 166 P.2d 642, 643 (1946) ("[A] natural channel may be used as a conduit or drain for the flow of such [foreign] waters . . . as long as it does not interfere with the rights of another"); *cf. County Bd. of Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 714 n.36 (Colo. 2002) (holding that owners of overlying land have no right to prevent use of aquifer storage space, but emphasizing that the case did not involve a claim of "interference with the use and enjoyment of the Landowners' surface or subsurface estates").

The Court of Appeals' contrary holding – that section 45-173(A) provides immunity for interfering with other land uses – is a vast leap and dramatically transforms the statute into something that was never contemplated, intended, or understood by landowners. At the time South West bought its properties and commenced mining, the court's expansive interpretation was (1) unprecedented under Arizona law, (2) inconsistent with square authority from the state's highest court, *see Vantex Land & Dev.*, 82 Ariz. at 57, 308 P.2d at 256, (3) directly contrary to the expressed views of the state agency charged with developing and enforcing Arizona's recharge laws, and (4) perhaps most significantly in direct conflict with the legislature's directive that underground water storage should not be permitted if it would cause "unreasonable harm" to land uses that were "in

existence when the permit was issued," A.R.S. §§ 45-811.01(C)(3), -814.01(G).[5]

Second, even if it is accepted that the territorial statutes authorized the injurious use of natural channels, there is no serious question that the 1986 amendment adding "underground water storage" as a permissible use significantly broadened this title limitation far beyond existing law. The Arizona Court itself acknowledged as much in its *West Maricopa Combine* decision:

> Section 45-173 does more than simply codify the rights of water users in the natural channel that delivers their appropriation. By allowing "the location of an underground storage facility," the statute expressly *authorizes a new use of an existing channel by the introduction of water originating in another water system.*

---

[5] Given the seeming clarity of this prior law, even CAWCD understood at the time it was designing the project that it could not interfere with South West's mining operations, representing in its 1997 permit applications that it would "insure [sic] that unreasonable harm does not occur to these gravel operations" and that it would "maintain contact with the two gravel mining operators to assess the total depth of the mining operations" in order to "project whether a concern exists at the mining operations." CAWCD also acknowledged that the consent of property owners was required to transport water in the river channel running through private land, stating that "[e]asements from land owners in the project's managed segment are being negotiated at this time to allow water to be conveyed as surface water from the blowoff structure to the recharge basins."

Pet. App. 9 (quoting *West Maricopa Combine*, 200 Ariz. at 409, 26 P.3d at 1180) (emphasis added). Given this candid admission, it was wholly unreasonable for the court to conclude that prior law nevertheless already embodied a right to "store" water imported from an outside source.

There also is no serious dispute that the 1986 amendment also greatly expands any pre-existing title limitation by permitting water to be impounded in "spreading basins" constructed in the channel. Unable to deny this fact, the court simply chose to ignore it grossly mischaracterizing the "constructed" portion of the recharge facility as "water . . . conveyed downstream as surface flow after the aquifer becomes saturated." Pet. App. 3.

In a concurring opinion in *Hughes v. Washington*, 389 U.S. 290 (1967), Justice Stewart noted his concern for state court rulings that retroactively eliminate property rights, stating that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 296-97. In his dissent from the denial of *certiorari* in *Stevens v. City of Cannon Beach*, Justice Scalia echoed this sentiment when he emphasized that "[o]ur opinion in *Lucas* . . . would be a nullity if anything that a State court chooses to denominate 'background law' – regardless of whether it is really such – could eliminate property rights." 510 U.S. 1207, 114 S. Ct. 1332, 1334 (1994). To allow the

decision below to stand would grant "the government[] power to redefine the range of interests included in the ownership of property" without "constrain[t] by constitutional limits" in stark violation of the Fifth and Fourteenth Amendments. *Lucas*, 505 U.S. at 1014.

II. The Decision Below Conflicts With Other Decisions Of This Court.

The decision below also cannot be reconciled with *United States v. Causby*, 328 U.S. 256 (1946), as well other decisions of this Court that have refused to permit the government to impose new easement rights (without compensation) that go beyond what a pre-existing title limitation would allow. *See, e.g.*, *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950) (rejecting government's claim of immunity for the Central Valley Project under its navigational servitude, and stating that "this Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed"); *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926) (holding that government "may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation").

Like this case, *Causby* involved an asserted right to engage in the harmful physical invasion of property in the analogous context of overflying aircraft. In both cases, it makes little sense, and would unduly impair other competing public interests, to require compensation for technical trespasses that cause no harm, whether far above or below the surface. Although the ancient "cujus" doctrine must give way under these circumstances, that is no justification for "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Even where property owners have no legitimate entitlement to exclude physical invasions far above or below the surface of their property, where the invasion nevertheless results in the destruction of legitimate and constitutionally protected rights to make productive use of one's property, compensation is required. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("Even if the Government physically invades only an easement in property, it must nonetheless pay just compensation").

Despite repeated statements in the decision below to the contrary, this case is not about *non-harmful* physical invasions of property. If a government agency had merely stored water in an unused aquifer far beneath the surface and had not interfered with the use of South West's property, this Court's intervention would not be required. Far from asserting that type of claim, however, this case, like

Causby, involves the destruction of South West's legitimate and constitutionally protected right to the use and enjoyment of its property. Under *Lucas*, where the government's taking of that right has no historical analogue in the state's background law of property – as revealed by an objectively reasonable application of relevant precedents – compensation is required.

III. The Decision Below Raises Important Constitutional Issues That Should Be Resolved By This Court.

In *Lucas*, the Court did not have occasion to discuss at length the circumstances in which a State's proscription of a landowner's use would or would not be based on "existing rules or understandings." *Lucas*, 505 U.S. at 1030. The Court remanded for adherence to the rule it had announced, with the terse caution that South Carolina would need to do more than rely on generalities, or *ipse dixit* rationales, in attempting to establish that its restrictions on beneficial use could find support in extant background principles. *Id.* at 1031-32. In many cases, this is a relatively straightforward exercise, and the Court's decision in *Lucas* provides all the guidance that is needed. The sources of statutory or common law said by the State to establish relevant background principles may be consulted to determine whether they fairly can be said to, indeed, proscribe a particular use. And this Court's observation that asserted background principles must be viewed with

some measure of skepticism given the common law's favorable treatment of productive uses of land is, presumably, adequate to assist the States in drawing a line between permissible and impermissible land restrictions without extensive intervention by this Court. *See id.* at 1031 ("[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land").

This case, however, presents a different paradigm. The "background principle" on which the Court of Appeals' relied here was not the established common law of nuisance or property. Nor, on the other hand, is this strictly a so-called "judicial takings" case, where a takings claim is premised on the assertion that a State Court has fabricated a brand new rule.[6] It is something in between. The Court of Appeals relied on an interpretation (in our view, a highly dubious one) of a 2001 judicial decision that in turn (also dubiously) interpreted Arizona's territorial statutes. Thus, this case does not implicate the same considerations about the Court's traditional deference

---

[6] This Court may, however, resolve *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151 (argued Dec. 2, 2009), in a way that calls the Arizona Court of Appeals' analysis below into question. Accordingly, if the Court does not grant this Petition, the Court should, at a minimum, hold the Petition until it decides No. 08-1151, with the potential view toward remanding to the Court of Appeals for reconsideration in light of *Stop the Beach Renourishment*.

to state law pronouncements about property law, *see Lucas*, 505 U.S. at 1030, as a strict judicial takings case might. But it does present the Court with the opportunity to provide much-needed guidance about the takings implications of brand new (and unreasonable) interpretations of recent statutes that result in the permanent physical occupation of land.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT G. SCHAFFER
Counsel of Record
ROBERT F. ROOS
LAWRENCE A. KASTEN
LEWIS AND ROCA, LLP
40 N. Central Avenue
Phoenix, Arizona 85004
(602) 262-5311

Counsel for Petitioner

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SOUTH WEST SAND & GRAVEL, INC., an Arizona corporation, Plaintiff/Appellant, v. CENTRAL ARIZONA WATER CONSERVATION DISTRICT, an Arizona municipal corporation, Defendant/Appellee.	1 CA-CV 07-0435 DEPARTMENT D **OPINION** **FILED 11-10-08** **(As Amended by Order filed 3-9-09)**

Appeal from the Superior Court of Maricopa County

Cause No. CV 2005-001297

The Honorable Edward O. Burke, Judge

AFFIRMED

Lewis and Roca LLP — Phoenix
By Robert F. Roos
Lawrence A. Kasten
Robert G. Schaffer
Attorneys for Plaintiff/Appellant
South West Sand & Gravel, Inc.

Ryley Carlock Applewhite — Phoenix
By John C. Lemaster
Jenny J. Pelton
Sean T. Hood
Attorneys for Defendant/Appellee
Central Arizona Water Conservation District

Salmon, Lewis & Weldon, P.L.C. Phoenix
By M. Byron Lewis
Mark A. McGinnis
Attorneys for Amicus Curiae Salt River Project
Agricultural Improvement and Power District

W. Patrick Schiffer, Chief Counsel, Phoenix
Arizona Department of Water Resources
By Gregg A. Houtz, Deputy Counsel
Attorneys for Amicus Curiae
Arizona Department of Water Resources

Stephen M. Kemp, Acting City Attorney, Peoria
Peoria City Attorney's Office
By Cynthia Odom, Assistant City Attorney
Attorneys for Amicus Curiae City of Peoria

Sacks Tierney P.A. Scottsdale
By Marvin S. Cohen
Attorneys for Amicus Curiae City of Tucson

Gallagher & Kennedy, P.A. Phoenix
By Mark A. Fuller
Attorneys for Amici Curiae Arizona Rock Products
Association and Arizona Mining Association

THOMPSON, Judge

¶1 South West Sand & Gravel, Inc. (South West) appeals from a grant of summary judgment on its taking and tort claims against the Central Arizona Water Conservation District (the District). Based on our decision in *West Maricopa Combine, Inc. v. Arizona Department of Water Resources*, 200 Ariz. 400, 26 P.3d 1171 (App. 2001), Arizona Revised Statutes (A.R.S.) section 45-173 (1994), and Arizona's

historic encouragement of the full use of scarce water resources in our arid climate, we affirm the grant of summary judgment.

FACTUAL AND PROCEDURAL HISTORY

¶2 The District manages the Central Arizona Project (CAP) and promotes water conservation in an area encompassing Maricopa, Pima, and Pinal Counties. Pursuant to A.R.S. § 45-891.01(3) (1994), the Arizona Legislature has authorized the District to operate taxpayer-funded underground storage facilities (USFs), also known as "state demonstration projects," to store CAP water when there is no immediate demand for it.

¶3 The District applied to the Arizona Department of Water Resources (ADWR) for permits to operate the Agua Fria Recharge Project (the Project), a state demonstration project within a four-mile reach of the Agua Fria River south of the New Waddell Dam. The Project consists of: (1) a managed underground storage facility, from which water is diverted from the CAP canal into the Agua Fria River's channel so it may infiltrate the aquifer underlying the river; and (2) a constructed underground facility, where water is conveyed downstream as surface flow after the aquifer becomes saturated. Both facilities are located near the Agua Fria River's natural channel. South West owns properties near the Project. Its South Property is located in the bed of the Agua Fria River, and its

North Property is on the river's west bank, at an elevation higher than the streambed.

¶4 The Department issued the permits to the District on May 4, 1999, authorizing the District to store 100,000 acre-feet of water each year for twenty years in the Project. The permits authorize the District to conduct recharge into the Agua Fria River but also require the District to observe operational limits that maintain groundwater levels below the depth of South West's sand and gravel pits as they existed when the permits were issued.

¶5 Pursuant to the permits, the District began diverting CAP water into the Agua Fria River in 1999. As a result, the aquifer underneath and adjacent to the Agua Fria River filled with water, thereby raising the water table beneath South West's property to a level that interfered with its sand and gravel mining business.

¶6 It is undisputed that the groundwater reaches South West's property through a natural hydrologic connection between the surface of the riverbed and the underlying aquifer. Prior to the construction of the Waddell Dam in the 1920s, the water levels in the aquifer beneath and adjacent to the Agua Fria River would have been at or near the surface. In conducting recharge into the river, the District has raised water levels in the river's aquifer, but the District contends that those levels remain below what they would have been under the river's natural flow.

¶7 South West sued the District in Maricopa County Superior Court, alleging negligence, negligence *per se*, trespass, nuisance, and inverse condemnation. South West moved for partial summary judgment, and the District moved for summary judgment on the North and South Properties. The trial court granted the District's motion and denied South West's motion as to the South Property. Because the record was not clear as to whether the water table beneath the North Property had risen to a level exceeding the aquifer's natural capacity, the trial court denied both summary judgment motions as to the North Property.

¶8 South West filed a motion for reconsideration/clarification. The trial court then granted summary judgment to the District for the North Property as well based upon the record and concessions made in the motion for reconsideration. This appeal followed.

DISCUSSION

A. As a Matter of Law, South West Has No Cognizable Taking Claim

¶9 On appeal from a grant of summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the trial court correctly applied the substantive law to those facts. *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 140, ¶ 26, 128 P.3d 756, 763 (App. 2006). Summary judgment is warranted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that

reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Our review of the trial court's construction of the relevant statutes, a determination of law, is *de novo*. *Ariz. Dep't of Revenue v. Blue Line Distrib., Inc.*, 202 Ariz. 266, 266, ¶ 4, 43 P.3d 214, 214 (App. 2002).

¶10 Arizona law has historically recognized that the owner of stored waters has the right to use a natural stream to move and store water. Rev. Stat. of Ariz. Terr. §§ 4202-03 (1901). The intention of our early statutes was "to make the use of water, as much so as practicable, within the reach of all, and to guard it against monopoly by private ownership on the one hand, and against being hemmed in by the ownership of the adjacent land, liable to be acquired and held by speculators, on the other hand." *Oury v. Goodwin*, 3 Ariz. 255, 275-76, 26 P. 376, 383 (1891).

¶11 In 1986, the Arizona Legislature adopted a comprehensive water storage and recovery program. *W. Maricopa Combine*, 200 Ariz. at 405, ¶ 22, 26 P.3d at 1176 (citing Sec. 14, Chap. 289, Laws of 1986). Providing for water storage in Arizona's natural watercourses supports the twin policies of preserving groundwater and utilizing Colorado River water. *Id.* (citing A.R.S. §§ 45-801, -895 (1994), 45-1701, -1722 (1994)). The water at issue in this case comes from the CAP. We have recognized that the CAP "is indispensable for the maintenance of life and prosperity" in Arizona. *Taft v. Ball, Ball & Brosamer, Inc.*, 169

Ariz. 173, 175, 818 P.2d 158, 160 (App. 1991) (citation omitted).

¶12 While Arizona was developing its statutes and policies on water storage, it decided to deviate from the riparian law of water rights enacted in most states. The Arizona Constitution repudiates the concept of riparian water rights and follows the law of prior appropriation. *See* Ariz. Const. art. 17, § 1. In Arizona, like California and Nevada, "'the right to running water exists without private ownership of the soil. . . .'" *Hill v. Lenormand*, 2 Ariz. 354, 357, 16 P. 266, 268 (1888) (quotation omitted). Thus, "when a person acquires land he takes it subject to any water rights which might have been initiated according to the law." *England v. Ring*, 8 Ariz. App. 374, 378, 446 P.2d 480, 484 (1968), *vacated on other grounds*, 105 Ariz. 65, 459 P.2d 498 (1969).

¶13 The Arizona Legislature recognizes a right to locate an underground storage facility (USF) in a natural stream:

> Although the waters which naturally flow in the natural channel of a stream have been previously appropriated and put to beneficial use by others, the channel may be used to carry water of another or used for the location of an underground storage facility pursuant to chapter 3.1 of this title, if such use can be made without diminishing the quantity of water which naturally flows therein the use of which has been appropriated.

A.R.S. § 45-173(A). Nevertheless, South West contends that the District's use of an Arizona riverbed to transport and store water may give the owner of the riverbed and adjacent land a cause of action for a governmental taking and trespass.[1]

¶14 Our main goal in construing this statute is to "discern and give effect to legislative intent." *People's Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, 403, ¶ 7, 46 P.3d 412, 414 (2002). We "construe the statute as a whole, and consider its context, language, subject matter, historical background, effects and consequences, and its spirit and purpose." *Id.* (citations omitted).

¶15 In *West Maricopa Combine*, we concluded that A.R.S. § 45-173(A) allows a party to use another's real property to run water down the naturally existing Hassayampa riverbed. 200 Ariz. at 402-04, ¶¶ 1-15, 26 P.3d at 1173-75. Like South West, the landowner contended that the proposed action constituted a governmental taking and a trespass. *Id.* at 409-10, ¶¶ 42-47, 26 P.3d at 1180-81. We held that the plain

---

[1] The Fifth Amendment to the United States Constitution states in relevant part: "[N]or shall private property be taken for public use, without just compensation." The Due Process Clause of the Fourteenth Amendment applies the Takings Clause to the states. *See Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978). Similarly, Article 2, Section 17, of the Arizona Constitution provides in relevant part: "No private property shall be taken or damaged for public or private use without just compensation having first been made. . . ." South West's appeal relies upon both the state and federal constitutions.

language of A.R.S. § 45-173(A) contemplates that private property may be used to carry "water of another or used for the location of an underground storage facility." *Id.* at 405, ¶ 18, 26 P.3d at 1176.

¶16 We also held that allowance of West Maricopa Combine's use of another's real property to transport water did not constitute a taking. *Id.* at 409, ¶¶ 42-45, 26 P.3d at 1180. As we pointed out, any taking inquiry must first resolve whether the private party ever possessed the right that assertedly has been taken. *Id.* at ¶ 44 (citing Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 Ariz. St. L.J. 423, 427 (1995)). We concluded that no taking had occurred because "the permitting process does not alter the pre-existing rights of the parties":

> Section 45-173 does more than simply codify the rights of water users in the natural channel that delivers their appropriation. By allowing "the location of an underground storage facility," the statute expressly authorizes a new use of an existing channel by the introduction of water originating in another water system.
>
> . . .
>
> 10K's title to the land adjacent to the Hassayampa River was taken subject to existing water rights. Specifically, 10K took its title subject to the inherent limitations arising from the state's reservation of the natural channels to move and store water. No taking

> can arise by this pre-existing limitation and this result is entirely harmonious with A.R.S. § 45-814.01(H).

Id. at ¶¶ 42-45; *accord Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (holding that a state may refuse compensation "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *In re Water Use Permit Applications*, 9 P.3d 409, 493-95 (Haw. 2000) (concluding that no property interest existed and denying a takings claim based upon groundwater restrictions). Under this analysis, South West took its property subject to Arizona's reservation of natural channels to move and store water. The District was using that channel for the intended statutory purpose. No taking can arise from such activity.

B. As a Matter of Law, South West Can Assert No Cognizable Tort Claims Against the District

¶17 *West Maricopa Combine* also precludes South West's trespass claim, as well as the negligence, negligence *per se*, and nuisance claims. We found that "[t]respass may only be found here if 10K has the right to exclude others from using the Hassayampa, and it does not have such a right. . . . A claim for trespass would not lie under these facts because 10K was obliged to receive WMC's water." *W. Maricopa Combine*, 200 Ariz. at 410, ¶ 47, 26 P.3d at 1181; *see*

also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 67 (5th ed. 1984).

¶18 Section 45-173(A) allows the use of the Agua Fria River channel for "the location of an underground storage facility." The District's Project is located within the stream channel, and South West's sand and gravel properties are located in and along that channel. The statutory authority to locate a USF in a stream channel logically must include the authority to put water in that facility, as that is the entire purpose of a USF. Likewise, South West is obliged to accept the water the District placed in the Agua Fria River. *See W. Maricopa Combine*, 200 Ariz. at 410, ¶ 47, 26 P.3d at 1181. South West had no historical right to exclude others from using the channel, and a claim for trespass or other wrongful injury cannot lie under these facts. *See id.*

¶19 South West and amici Rock Products Association and Arizona Mining Association attempt to distinguish *West Maricopa Combine* on the ground that the case involved no economic injury. *West Maricopa Combine* holds that because a landowner's title is subject to pre-existing limitations arising from the state's reservation of natural watercourses, landowners whose properties border a natural watercourse cannot maintain an action for trespass or a taking arising out of those activities. *See id.* at 409-10, ¶¶ 42-47, 26 P.3d at 1180-81. Whether the right is "economic" or not, our holding makes clear that suit cannot be

maintained on a right that never vested in the property owner to begin with.[2]

¶20 This result is bolstered by the Colorado Supreme Court's decision in *Board of County Commissioners of County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (Colo. 2002). Like Arizona, Colorado authorizes USFs and provides for entities to use stream channels for these facilities. In *Park County*, landowners brought a declaratory judgment action seeking a determination that the defendant ranch had no right to artificially recharge and store water in aquifers underlying their land without the landowners' permission. *Id.* at 700, 703. The Colorado Supreme Court held that the ranch had no obligation to seek the landowners' permission or to pay just compensation because a recharge does not constitute a trespass. *Id.* at 706-07. The same logic applies here. *See also Chance v. BP Chems., Inc.*, 670 N.E.2d 985, 992-94 (Ohio 1996) (rejecting a trespass

---

[2] For this reason *West Maricopa Combine* is distinguishable from *United States v. Causby*, 328 U.S. 256 (1946). In *Causby*, the airspace at issue was not "within the navigable airspace which Congress placed within the public domain" and the landowners could therefore maintain a takings claim because the government had infringed on their right to exclude. *Id.* at 264. Here, Arizona reserved the natural channels to store water, and South West does not possess the right to exclude recharge water from the Agua Fria River.

claim based upon absolute ownership of water and migration of liquid injected into the aquifer).[3]

C. As a Matter of Law, the Doctrine of Non-Injurious Use is Inapplicable

¶21 South West and amici further contend that *West Maricopa Combine* is not controlling here because the "doctrine of non-injurious use" limits the District's right to transport and store water under A.R.S. § 45-173(A). We disagree.

¶22 In support of the non-injurious use argument, South West and amici cite *Vantex Land & Development Co. v. Schnepf*, 82 Ariz. 54, 308 P.2d 254 (1957), and *Podesta v. Linden Irrigation District*, 296 P.2d 401 (Cal. Ct. App. 1956). Their reliance on these authorities is misplaced. *Vantex* concerned a bulldozed drainage ditch used to carry waste water from two non-parties' agricultural properties across the defendants' property and onto the plaintiff's property. 82 Ariz. at 55, 308 P.2d at 255. The defendants dammed the ditch so that they could impound the waste water and use it for irrigation. *Id.* The plaintiff intended to appropriate the waste water and sought to enjoin the defendants from intercepting it. *Id.* The issue was

---

[3] These arguments are also dispositive of South West's inverse condemnation claim. South West asserted this claim with respect to the North Property only. South West cannot prevail on the claim because it has not established a taking. *See Niles Sand & Gravel Co. v. Alameda County Water Dist.*, 112 Cal. Rptr. 846, 854 (Cal. Ct. App. 1974).

"whether the defendants are legally obliged to allow these waste waters to pass through their land without interruption for the use and benefit of plaintiff." *Id.* at 56, 308 P.2d at 256. The Arizona Supreme Court decided that "[t]o enjoin the defendants from stopping this water would encumber their property with the burden of a servitude the law does not authorize." *Id.* at 57, 308 P.2d at 257.

¶23 *Vantex* relied on *Podesta* in holding that the burden of the servitude placed upon land does not include the obligation "to receive waste water from the dominant estate." *Id.* at 56, 308 P.2d at 256 (citing *Podesta*, 296 P.2d 401). It occurred in the context of the artificial introduction of water into a historically dry natural watercourse. *Id.* at 55, 308 P.2d at 255. In contrast to this case, *Vantex* involved the discharge or appropriation of irrigation waste water, not the transportation and storage of surface water in a river. *Id.* As *West Maricopa Combine* explains, the principles that apply in the limited context of two competing water users are inappropriate in a case involving the use of a river channel to transport and store CAP water. 200 Ariz. at 406, ¶¶ 25-26, 26 P.3d at 1177.

D. As a Matter of Law, the State's Reservation of Waters for Transportation and Storage is Not Limited to Natural Water Flow

¶24 *West Maricopa Combine* also disposes of South West's argument that the state's reservation of its natural channels is limited to natural water flow. We

previously concluded that this argument did not comport with A.R.S. § 45-173, which "indicates a *specific* contemplation of the addition of water that is not 'natural' to the waterway," or with Arizona's policy of maximizing beneficial use of a scarce resource. *W. Maricopa Combine*, 200 Ariz. at 406-07, ¶¶ 28, 29, 26 P.3d at 1177-78 (emphasis added) (citing *Pima Farms Co. v. Proctor*, 30 Ariz. 96, 102, 245 P. 369, 371 (1926)). This court declined to recognize any legal distinction between CAP water introduced for water recharge and the river's natural flow. *Id.* at 406, 407, 129, 26 P.3d at 1177, 1178 ("[T]his court previously found that the CAP . . . 'brings with it the benefits and burdens of a natural watercourse.'") (quoting *Taft*, 169 Ariz. at 176, 818 P.2d at 161).

¶25 South West nevertheless maintains that the state's reservation of the use of natural channels is limited to naturally occurring surface waters or flood waters. Under long-standing law, the owner of real property adjoining a natural watercourse may not assert a claim for damages arising out of the mere use of that watercourse to move and store water. *See S. Pac. Co. v. Proebstel*, 61 Ariz. 412, 420-24, 150 P.2d 81, 84-86 (1944) (holding that the defendant capturing water on its property and draining it into a natural watercourse without exceeding the channel's natural capacity could not be held liable for damages caused to a neighboring landowner's property where the water reached the plaintiff's land via a natural watercourse and was not conducted or discharged there). Landowners whose property adjoins a natural

watercourse assume the burden of the location they have chosen. *See Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n*, 111 Ariz. 65, 67-68, 523 P.2d 496, 498-99 (1974) (concluding that the Arizona Canal should be treated as a natural watercourse and landowners could not recover damages for negligence, trespass, inverse condemnation, and strict liability claims stemming from the choice of location near the Arizona Canal); *Beals v. State*, 150 Ariz. 27, 31, 721 P.2d 1154, 1158 (App. 1986) (holding that those who acquire property near a natural watercourse assume the burden of any loss their choice of location occasions and cannot recover damages from the state for any non-negligent refusal to remove natural vegetation from the river).[4]

¶26 As we explained in *West Maricopa Combine*, we cannot reconcile the concept that the permitted use of a natural channel for moving and storing water is limited to natural water flow with existing Arizona statutes and common law. Thus, a property owner "may not prevent a beneficial user from using an

---

[4] Equally unavailing is South West's attempt to fit its tort claim into a line of cases supporting the recovery of damages from the obstruction of a natural water course. *See, e.g., Gillespie Land & Irr. Co. v. Gonzalez*, 93 Ariz. 152, 165, 379 P.2d 135, 145 (1963) (landowner may not divert the natural waters of a stream in a manner that floods his neighbor's land). The record reflects that water reaches South West's property via a natural hydrological connection between the underlying aquifer and the river's surface. There was no genuine dispute that the recharge has not raised water tables above the natural carrying capacity with respect to the South Property.

existing natural watercourse for water storage purposes." *W. Maricopa Combine*, 200 Ariz. at 406, ¶ 24, 26 P.3d at 1177. Generally speaking, the property owner also is not entitled to have the water table beneath its land maintained at a static level. *See Brady v. Abbott Labs.*, 433 F.3d 679, 682-83 (9th Cir. 2005) (applying Arizona groundwater law to hold that a pecan orchard owner could not maintain common-law nuisance and negligence claims arising out of groundwater pumping by a neighbor); *Bristor v. Cheatham*, 75 Ariz. 227, 237-38, 255 P.2d 173, 179-80 (1953) (holding that a landowner may withdraw and use as much groundwater from the common supply as is necessary for the reasonable beneficial use of the overlying land without regard to the rights of adjoining landowners).[5]

¶27 *West Maricopa Combine* likewise rejected South West's argument that A.R.S. § 45-814.01(H) preserves the right to exclude water entering beneath property via a natural watercourse. According to this statute:

---

[5] South West's authorities on this point are distinguishable. Two address liability for the negligent operation of dams and other flood control structures. *See Natural Soda Prods. Co. v. City of Los Angeles*, 143 P.2d 12, 15 (Cal. 1943); *Kunz v. Utah Power & Light Co.*, 526 F.2d 500, 503-04 (9th Cir. 1975). Another case concerned a state's assertion of ownership of property between the high and low water marks of Lake Tahoe, *California v. Superior Ct. of Placer County*, 625 P.2d 256, 257-58 (Cal. 1981), and yet another involved the application of strict liability to a government flood-control project. *Atkins v. California*, 71 Cal. Rptr. 2d 314, 317, 325 (Ct. App. 1998).

> Nothing in this article shall be construed as modifying or infringing on any existing water rights or private property rights nor shall anything in this article prevent any person or entity, whether governmental or private, from undertaking any flood control projects, including removal of vegetation within the channel of the stream or on the adjacent floodplain or diverting the permitted flow from the natural stream channel at the end of the permitted period.

A.R.S. § 45-814.01(H) (1995). We explained that real property ownership is distinct from ownership of water, below or above ground. *W. Maricopa Combine*, 200 Ariz. at 408, ¶¶ 37-38, 26 P.3d at 1179. Arizona has abrogated the riparian rights doctrine, and allows stream waters to be appropriated for use or to remain in the stream without regard to the rights of landowners bordering the stream. *See* John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J. 657, 706-07 (1988). South West has no private property rights allowing it to exclude others for purposes of trespass or to support a taking.

E. As a Matter of Law, A.R.S. § 45-811.01 Does Not Support South West's Claim for Unreasonable Harm

¶28 Having concluded that *West Maricopa Combine* disposes of South West's taking and tort claims, we now turn to South West's remaining arguments.

South West contends that the District has a statutory duty to determine that a USF will not cause unreasonable harm, and that the benefits of that duty extend to other landowners and continue beyond the permit stage. According to A.R.S. § 45-811.01(C)(3) (1994):

> The [Arizona Department of Water Resources] director may issue a permit to operate an underground storage facility if the director determines that all of the following apply:
>
> 3. Storage at the facility will not cause unreasonable harm to land or other water users within the maximum area of impact of the maximum amount of water that could be in storage at any one time at the underground storage facility over the duration of the permit.

¶29 The other four prerequisites for the permit are: (1) the applicant has the technical and financial ability to construct and operate the facility; (2) storage of the maximum amount of water that could be in storage is hydrologically feasible; (3) the applicant has agreed in writing to obtain any necessary flood plain permits; and (4) the Arizona Department of Environmental Quality has determined that the facility will not cause the migration of plumes of contaminants. *Id.* The statute is one provision of the Underground Water Storage, Savings and Replenishment Act, A.R.S. §§ 45-801.01 to -898.01.

¶30 On its face, A.R.S. § 45-811.01(C)(3) applies only to the ADWR's decision to issue a permit. Nothing in A.R.S. § 45-811.01(C)(3) imposes a continuing and independent obligation on the owner or operator of the USF or on the ADWR.[6] The statute does not address enforcement of the conditions of a permit, once issued. The statute concerns only the prerequisites to issuance of the permit. Nowhere in A.R.S. § 45-811.01(C)(3) did the Arizona Legislature create a continuing cause of action against the owner or operator of a USF.

¶31 More importantly, the ADWR has consistently interpreted the "no unreasonable harm" requirement in A.R.S. § 45-811.01 in a manner inconsistent with South West's proffered interpretation. ADWR construes that prerequisite to apply only to harm to a use taking place at the depth of a sand and gravel pit as it existed at the time the permit was applied for and issued. *See* ADWR's Substantive Policy Statement on Unreasonable Harm and Hydrologic Feasibility (Dec. 10, 2002) at 9 (ADWR Policy Statement) (limiting consideration of unreasonable harm only to "existing and ongoing uses of land. . . ."). We accord great weight to an agency's interpretation of the

---

[6] Another statute, A.R.S. § 45-814.01(F), not cited by appellant, does authorize the Director to "require the holder of a storage facility permit to monitor the operation of the facility and the impact of water storage at the facility on land and other water users within the area of impact of water stored at the storage facility."

statutes it is entrusted to administer. *See Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 208 Ariz. 147, 154, ¶ 30, 91 P.3d 990, 997 (2004) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer") (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); *Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 211 Ariz. 146, 152-53, ¶ 25, 118 P.3d 1110, 1116-17 (App. 2005).

¶32 The ADWR Policy Statement acknowledges that the Arizona Legislature has accorded so much importance to underground water storage that it allows some harm to third parties to further the advancement of that goal; a permit may be denied only if the harm to others is unreasonable. ADWR Policy Statement at 1. The agency director (the Director) conditions underground storage permits on the establishment of alert levels and operational prohibition levels that would not allow stored water to enter existing sand and gravel pits. While harm to a pit as it existed when the permit issued would be unreasonable, ADWR does not consider harm that may occur if the pit is expanded after the permit is issued. This interpretation is consistent with A.R.S. §§ 45-814.01(D) and (G), which provide that the Director shall consider unreasonable harm only to uses existing at the time the permit issued when deciding whether to grant an application for renewal or modification of a USF permit.

¶33 The contrary interpretation advocated by South West and amici, which would require ADWR to consider the depth a sand and gravel operation might reach sometime in the future, could unduly prevent persons with excess Colorado River water and effluent from storing that water underground when it was available. In the ADWR's view, it would be inconsistent with legislative policy to allow mine operators to reserve empty aquifer space below their land for possible future mining activities by denying underground storage of available excess renewable water supplies. Little underground storage would occur if agencies and courts permitted sand and gravel entities to derail permit applications, prevent recharge and freeze the underground water table at artificially deep levels resulting from prior stream diversions, dams, and groundwater withdrawals. The state would be left with increasingly lowered groundwater levels. In contrast, determining unreasonable harm based upon uses existing at the time of permitting would encourage use of Arizona's underground aquifers for storage of excess Colorado River water and effluent.

F. As a Matter of Law, the District is Not Liable for Raising Underground Water Levels

¶34 Equally unavailing are the arguments South West derives from the doctrine of "*cujus est solum ejus est usque ad coelum et ad inferos*" (the "*cujus* doctrine"). The doctrine states: "To whomsoever the

soil belongs, he owns also to the sky and to the depths. The owner of a piece of land owns everything above and below it to an indefinite extent." Black's Law Dictionary 341 (5th ed. 1979). In essence, South West argues that its ownership of overlying land gives it the power to preclude water recharge and increased groundwater levels while claiming damages for trespass, nuisance, and other claims based upon such activities.

¶35 Time after time, Arizona courts have held that landowners do not own the groundwater below their property and the state is free to regulate its withdrawal and use. In *Town of Chino Valley v. City of Prescott*, the Arizona Supreme Court stated: "We therefore hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct[7] of the water." 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981), *appeal dismissed*, 457 U.S. 1101 (1982).

¶36 In this case, the Director determined that the District's storage would not cause unreasonable harm to South West. He made this determination in an administrative proceeding subject to appeal under

---

[7] "Usufruct" is the "the right to use and enjoy the profits of property that belongs to another." *Davis v. Agua Sierra Res., L.L.C.*, 217 Ariz. 386, 392 n.8, ¶ 22, 174 P.3d 298, 304 n.8 (App. 2008) (citing *Paloma Inv. Ltd. P'ship v. Jenkins*, 194 Ariz. 133, 138 n.1, ¶ 22, 978 P.2d 110, 115 n.1 (App. 1998)).

Title 41, Chapter 6, Article 10, A.R.S. § 45-114. Just as South West has no right to control the use of the water, so it cannot control the movement of water in natural water-bearing formations. *See Park County Sportsmen's Ranch, LLP*, 45 P.3d at 707.[8] It therefore can state no claim for trespass or a taking. Our resolution of this issue obviates the need to consider whether South West's claims are an impermissible collateral attack on the District's permits or whether South West's claims are barred by its failure to appeal the permits or object to the permits granted to the District.

CONCLUSION

¶37 For the foregoing reasons, we affirm the grant of summary judgment on South West's taking and tort claims and deny South West's request for attorneys' fees on appeal.

---

[8] South West cites a footnote in *Park County* that states: "We are not presented here with a cause of action in tort for interference with surface uses due to recharge that raises the groundwater table or with any claim to interference with the use and enjoyment of the Landowners' surface or subsurface estates." 45 P.3d at 714 n.36. South West's claim is not for the actual use of the surface or subsurface, but is based upon an asserted right to control the movement of water beneath its properties. *Park County* rejected the "assertion of absolute ownership of everything below the surface of [property owners'] properties." *Id.* at 701.

JON W. THOMPSON, Judge

CONCURRING:

DIANE M. JOHNSEN, Presiding Judge

ANN A. SCOTT TIMMER, Judge

Michael K. Jeanes,
Clerk of Court
*** Electronically Filed ***
11/09/2006 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-001297 11/08/2006

HONORABLE BARRY C. SCHNEIDER CLERK OF THE COURT
E. Parrish
Deputy

SOUTH WEST SAND & GRAVEL INC ROBERT F ROOS

v.

CENTRAL ARIZONA WATER CONSERVATION DISTRICT JENNY J PELTON

MINUTE ENTRY

The court has received and reviewed Plaintiff's Motion for Partial Summary Judgment, Defendant's Response, and Plaintiff's Reply. The court has also received and reviewed Defendant's Motion for Summary Judgment, Plaintiff's Response, and Defendant's Reply. The court heard oral argument on September 18, 2006.

IT IS ORDERED DENYING Plaintiff's Motion for Partial Summary Judgment.

IT IS FURTHER ORDERED GRANTING IN PART AND DENYING IN PART Defendant's Motion for Summary Judgment.

Plaintiff operated a sand and gravel mining business on multiple parcels of land in and adjacent to the Agua Fria River. In 1999, Defendant began diverting Central Arizona Project (CAP) water into the Aqua Fria River pursuant to permits issued by the Arizona Department of Water Resources. As a result, the natural aquifers underneath and adjacent to the Agua Fria River filled with water, thereby raising the water table underneath Plaintiff's property to the level that it interfered with the operation of Plaintiff's sand and gravel mining business. Plaintiff's south property is located within the Aqua Fria River, and Plaintiff's north property is located approximately 1000 feet west of the Aqua Fria River.

Plaintiff argues that *West Maricopa Combine, Inc. v. Arizona Dept. of Water Resources,* 200 Ariz. 400, 26 P.3d 1171 (App. 2001), is not dispositive of the instant matter because, *inter alia,* the landowner in *West Maricopa Combine* did not suffer "interfere[nce] with the existing use and enjoyment of its property." (Pl.'s Reply in Supp. of its Mot. for Partial Summ. J. 4:20-22). While the court agrees that *West Maricopa Combine* is not on all fours with the instant matter, much of its analysis and reasoning is nevertheless applicable.

The *West Maricopa Combine* court held that the threshold "inquiry into a governmental taking from a

private party . . . [is] whether the private party ever had the right at issue." 200 Ariz. at 409, 26 P.3d at 1180 (internal citations omitted).

> Specifically, [it] require[s] inquiry into the nature of the owner's title to see whether it is subject to any "pre-existing limitation" authorizing the governmental action. In other words, the court must ascertain whether the owner's title is subject to an inherent limitation that "background principles of the State's law of property and nuisance already place upon land ownership."

Id. (alterations in original) (internal citations omitted). Therefore, the underlying question in the cross-motions for summary judgment is whether Defendant's actions, which resulted in raising the water table underneath Plaintiff's land, infringe upon any of Plaintiff's property rights. Without infringement, there can be no compensable taking, trespass, or nuisance.

Plaintiff "acknowledges that historically Arizona landowners have taken title to property in the natural channel subject to the rights of others to use the natural channel to move water." (Pl.'s Mot. for Partial Summ. J. 11:6-8). However, the *West Maricopa Combine* court went further than this when it determined that the state has the right to use a natural channel, not only to move water, but also to *store* water. 200 Ariz. at 405, 26 P.3d at 1176. In reaching this conclusion, the court noted that "The

Arizona Territorial Legislature expressly reserved the right to use natural watercourses to move and *store* waters." *Id.* (citing R.S. §§ 4202-03 (1901)) (emphasis added).

A direct consequence of using a natural watercourse to move water is that the aquifers underneath and adjacent to the watercourse will fill with water. *Maricopa County Mun. Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 96-97, 4 P.2d 369, 380 (1931). In reaching this conclusion, the court reasoned as follows:

> If the bed of a stream is not solid rock, but gravel or earth, water will always be found many feet beneath its surface, and there may and probably will be corresponding to the flow on the surface a current beneath it. Not only does it move along the course of the river, but it percolates from its banks from side to side, and the more abundant the surface water the further will it reach in its percolations on each side.

Id. It follows then, that when the state "reserved the right to use natural watercourses to move and store waters," *West Maricopa Combine,* 200 Ariz. at 405, 26 P.3d at 1176 (citing R.S. §§ 4202-03 (1901)), it necessarily reserved the right to use natural aquifers to store water. Assuming arguendo, if the state had not reserved this right, it would be unable to exercise its right to use watercourses to move water, as this would result in filling natural aquifers with water and infringing upon the rights of private property

owners. Therefore, although the water table underneath Plaintiff's property may have been lower at the time Plaintiff purchased the land in and adjacent to the Aqua Fria River, the state reserved the right to utilize the natural aquifers underneath Plaintiff's property to store water thereby raising the water table.

As the state reserved the right to utilize natural aquifers to store water, the next issue is whether any subsequent act may have abrogated the state's right. Plaintiff contends that it reasonably relied on the artificially lower water table that existed underneath its property when it commenced its mining operation. Therefore, Plaintiff contends that the state lost its right to utilize natural aquifers underneath Plaintiff's land to store water without paying compensation. Plaintiff relies on *Ramada Inns, Inc. v. Salt River Valley Water Users' Assoc.*, 111 Ariz. 65, 523 P.2d 496 (1974) to support this contention, but Plaintiff's reliance on this authority is misguided. In *Ramada Inns,* the court held that a longstanding artificial watercourse would be treated as a natural watercourse for the purpose of determining that nearby landowners assumed the same burdens and risk of loss "as are occasioned by a landowner locating by any natural feature of land. . . ." *Id.* at 68, 523 P.2d at 499. The risk of loss that a property owner assumes by locating next to a longstanding artificial watercourse is an entirely different proposition than the creation of a property right when locating next to an artificially dry watercourse. However, assuming

for the moment that *Ramada Inns* creates property rights for those that rely on the artificial state of any watercourse, it is distinguishable from the instant matter in one significant aspect. *Ramada Inns* was an action for damage to property located *near* a watercourse whereas in this case the Plaintiff is attempting to recover for damage to property located *within* a watercourse and associated natural aquifers. Clearly, adoption of the rule that Plaintiff suggests would be contrary to "Arizona's enduring and fundamental policy encouraging the full use of scarce water resources. . . ." *West Maricopa Combine,* 200 Ariz. at 406, 26 P.3d at 1177.

Plaintiff also contends that it is entitled to compensation because it suffered injury resulting from the raised water table. This argument, ironically, is defeated by the very case relied upon by Plaintiff, i.e., *Ramada Inns. Ramada Inns* recognized that "a landowner locating by any natural feature of land, [bears the risk of] any loss occasioned by such choice of location, [which does] not involv[e] the element of fault. . . ." *Ramada Inns,* 111 Ariz. at 68, 523 P.2d at 499. Therefore, when Plaintiff located its business within and adjacent to the Agua Fria River, it accepted the risk of any loss that would occur from the river flowing or the filling of the natural aquifer underneath its property.

As the foregoing demonstrates, as long as the diverted CAP water has stayed within the natural watercourse and has not exceeded the capacity of the natural aquifers, there has been no infringement of

Plaintiff's property rights. It is not clear from the record before the court whether the water table has risen to the point that it has exceeded the capacity of the natural aquifer underneath Plaintiff's north property. With this genuine issue of material fact remaining, the court must deny both of the cross-motions for summary judgment as to the north property.

As to the south property, the state has a right to utilize the Agua Fria River to move and store water and this right has not been abrogated by Plaintiff's reliance on the lowered water table that existed when it acquired the property. Rather, Plaintiff's injury is a risk that it must bear due to its choice of location within the river. Therefore, Defendant's motion for summary judgment is granted as to the south property and Plaintiff's motion for summary judgment is denied.

Michael K. Jeanes,
Clerk of Court
*** Electronically Filed ***
02/28/2007 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-001297 02/27/2007

HON. EDWARD O. BURKE

CLERK OF
THE COURT
W. Yank
Deputy

SOUTH WEST SAND &
GRAVEL INC ROBERT F ROOSE

v.

CENTRAL ARIZONA WATER
CONSERVATION DISTRICT JENNY J PELTON

MINUTE ENTRY

The court, having received and reviewed Defendant's Motion for Summary Judgment Re: North Property and Plaintiff's Request for Rule 56 Continuance, enters the following ruling:

IT IS ORDERED DENYING Plaintiff's Request for Rule 56(f) Continuance. No description was given by plaintiff of any evidence that is beyond plaintiff's control which justifies a continuance under Rule 56(f) A.R.C.P.

Based on the record in this case, the concessions made in plaintiff's Motion for Reconsideration, and

Judge Schneider's denial of plaintiff's Motion for Reconsideration,

IT IS ORDERED GRANTING defendant's Motion for Summary Judgment as to the North Property.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SOUTH WEST SAND & GRAVEL, INC., an Arizona corporation, Plaintiff/Appellant, v. CENTRAL ARIZONA WATER CONSERVATION DISTRICT, an Arizona municipal corporation, Defendant/Appellee.	1 CA-CV 07-0435 DEPARTMENT D MARICOPA COUNTY Superior Court No. CV 2005-001297 ORDER (Filed Mar. 13, 2009)

The court has received appellant's motion for reconsideration, appellee's response, appellant's motion for leave to file reply, and appellant's reply.

IT IS ORDERED denying the motion for reconsideration.

DATED this 13th day of March, 2009.

/s/ Jon W. Thompson
JON W. THOMPSON, Judge

Stephen M Kemp, City Attorney
Cynthia Odom, Assistant City Attorney
Peoria City Attorney's Office
Rm 280
8401 W Monroe
Peoria AZ 85345-6560
Attorneys for Amicus Curiae City of Peoria

Marvin S Cohen
Sacks Tierney PA
4th Floor
4250 N Drinkwater Boulevard
Scottsdale AZ 85251-3693
Attorney for Amicus Curiae City of Tucson

Mark A Fuller
Gallagher & Kennedy P A
Suite 1100
2575 East Camelback Road
Phoenix AZ 85016-9225
Attorney for Amicus Curiae AZ Rock/AZ Mining Assoc

Philip G Urry, Clerk
By

/s/ [Illegible]
Deputy Clerk

[SEAL]
Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

RACHELLE M RESNICK
CLERK OF THE COURT

SUZANNE D BUNNIN
CHIEF DEPUTY CLERK

October 28, 2009

RE: SOUTH WEST SAND & GRAVEL v CENTRAL AZ WATER
Arizona Supreme Court No. CV-09-0102-PR
Court of Appeals Division One
No. 1 CA-CV 07-0435
Maricopa County Superior Court
No. CV2005-001297

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 27, 2009, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Bales did not participate in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 28th day of October, 2009.

Rachelle M. Resnick, Clerk

TO:

Jenny J. Winkler
Gregg A. Houtz
C. Lincoln Combs
John C. Lemaster
Robert G. Schaffer
Judith M. Dworkin
Cynthia Odom
M. Byron Lewis
Philip G. Urry
sj

ARIZ. REV. STAT. 4202 (1901)

That whenever storage reservoirs shall be constructed in the Territory of Arizona, and water stored therein for subsequent distribution for irrigation or other useful purposes in times of shortage of water, that the owners of such reservoirs, and the waters stored therein, shall have the right to make use of the natural channels of streams in this territory to conduct said waters to the place or places where they shall desire to use said waters, or have them, used, and to divert the same from said natural channels at such places as shall be most convenient for said purposes.

ARIZ. REV. STAT. 4203 (1901)

That in the event that the, use of the waters which naturally flow in said natural channels shall have been previously appropriated by others, who have acquired the prior right to the use of them, then, and in such case, the owners of such reservoirs shall, nevertheless, have the right to make use of said natural channels without diminishing the quantity of water which naturally flows therein, and the use of which shall have been appropriated by others as aforesaid. In cases where the parties interested can not agree upon the division of the water turned into any natural channel from any storage reservoir from the water naturally flowing therein, and the use of, which shall have been previously appropriated by others, and if there be any difficulty in ascertaining

the several quantities to the use of which each party shall be entitled, then all the waters flowing in any natural channel shall be divided and distributed between the parties in interest in the manner following, to-wit: There shall be ascertained the quantity of water which shall flow into said natural channel from the storage reservoir, and from that quantity there be deducted one-half of one per centum for each one mile of length of the natural channel through which said water shall flow before being diverted therefrom, and the owners of storage reservoirs and those acting by their permission shall have the right to divert from the natural channel the quantity of water which shall flow into the natural channel from the storage reservoir, after deducting therefrom said per centum thereof, and said prior appropriators of the waters naturally flowing in said natural channels shall have the right to the use of all the remainder.

ARIZ. REV. STAT. CIV. CODE § 5342 (1913)

Whenever storage reservoirs shall be constructed in this state, and water stored therein for subsequent distribution for irrigation or other beneficial use in times of shortage of water, the owners of such reservoirs, or of the right to the use of the waters stored therein, shall have the right to makes use of the natural channels of streams in this state to conduct said waters to the place or places where they shall desire to use said waters, or have them used, and to divert the same from said natural channels at such places as shall be most convenient for said purposes.

ARIZ. REV. STAT. CIV. CODE § 5343 (1913)

In the event that the use of the waters which naturally flow in said natural channels have been previously appropriated by others, who have acquired' the prior right to the use of them, then, and in such case, the owners of such reservoirs shall, nevertheless, have the right to make use of said natural channels without diminishing the quantity of water which naturally flows therein, and the use of which shall have been appropriated by others as aforesaid. In cases where the parties interested cannot agree upon the division of the water, turned into any natural channel from any storage reservoir from the water naturally flowing therein, and the use of which shall have been previously appropriated by others, and if there be any difficulty in ascertaining the

several quantities to the use of which each party shall be entitled, then all the waters flowing in any natural channel shall be divided and distributed between the parties in interest in the manner following to-wit: There shall be ascertained the quantity of water which shall flow into said natural channel from the storage reservoir, and from that quantity there shall be deducted one-half of one per centum for each one mile of length of the natural channel through which said water shall flow before being diverted therefrom, and the owners of the storage reservoirs and those acting by their permission shall have the right to divert from the natural channel the quantity of water which shall flow into the natural channel from the storage reservoir, after deducting therefrom said per centum thereof, and said prior appropriators of the waters naturally flowing in said natural, channels shall have the right to the use of all the remainder.

ARIZ. REV. STAT. § 3323 (1928)

Natural waterways. Though the waters which naturally flow in the natural channels of streams have been previously appropriated and put to beneficial use by others, such channels may be used to carry water, without, however, diminishing the quantity of water which naturally flows therein, the use of which has been appropriated. Where the parties interested cannot agree upon the division of the water turned into the natural channel from the water naturally flowing therein, or if it be difficult to ascertain the amount to which each party is entitled, then the water superintendent of the district shall make such division. (§§ 4202-3, R. S. '01; 5342-3, R. S. '13, cons. & rev.)

ARIZ. CODE 1939 § 75-144

Natural waterways. Though the waters which naturally flow in the natural channels of streams have been previously appropriated and put to beneficial use by others, such channels may be used to carry water, without, however, diminishing the quantity of water which naturally flows therein, the use of which has been appropriated. Where the parties interested can not agree upon the division of the water turned into the natural channel from the water naturally flowing therein, or if it be difficult to ascertain the amount to which each party is entitled, then the water superintendent of the district shall make such division.

Title 45, section 811.01 of the Arizona Revised Statutes, states in pertinent part:

45-811.01. Underground storage facility permit

A. A person may apply to the director for a constructed underground storage facility permit or a managed underground storage facility permit and may operate an underground storage facility only pursuant to a permit.

* * *

C. The director may issue a permit to operate an underground storage facility if the director determines that all of the following apply:

* * *

3. Storage at the facility will not cause unreasonable harm to land or other water users within the maximum area of impact of the maximum amount of water that could be in storage at any one time at the underground storage facility over the duration of the permit.

Title 45, section 814.01 of the Arizona Revised Statutes, states in pertinent part:

45-814.01. Contents of storage facility permit

* * *

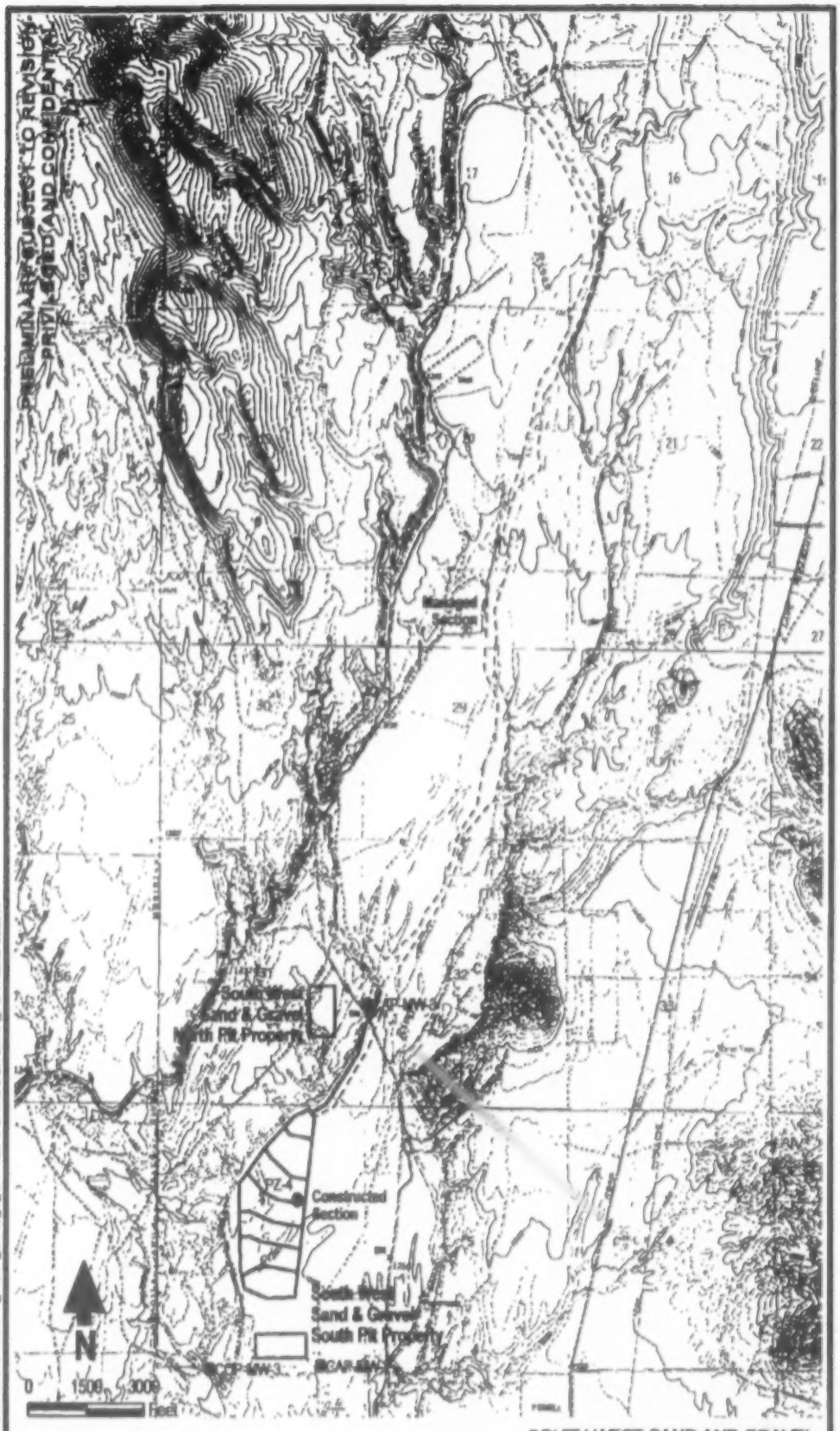
F. The director may require the holder of a storage facility permit to monitor the operation of the facility and the impact of water storage at the facility on land and other water users within the area of impact of water stored at the storage facility.

* * *

G. The director, on the director's initiative or on request of the holder of the storage facility permit, may modify the conditions of the storage facility permit. In determining whether modifications are necessary, the director shall not consider land uses and water uses in the area of impact of the water stored at the storage facility that were not in existence when the permit was issued.

H. Nothing in this article shall be construed as modifying or infringing on any existing water rights or private property rights.

* * *



SOUTH WEST SAND AND GRAVEL

Site Map

Daniel B. Stephens & Associates, Inc.
11/30/2005
JN LT05.0194

Figure 1

Q:\PROJECTS\LT05.0194-SOUTH_WEST_SAND_&_GRAVEL\GIS\MXD\SITEMAP_PORT MXD 5/23/11